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No. 07-660

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAWN GEORGETTE MYERS,

Petitioner,

vs.

CENTRAL FLORIDA INVESTMENTS, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit's conclusion that Myers could not show that Siegel's decision to file unrelated lawsuits against her after she was discharged was retaliatory, conflicts with this Court's precedent in *Burlington Northern & Santa Fe Ry. Co. v. White* or with any subsequent relevant circuit court opinion.

II. Whether the Eleventh Circuit's Opinion conflicts with this Court's decisions regarding corporate alter egos in *Faragher v. City of Boca Raton* or *Burlington Indus., Inc. v. Ellerth* or with any other relevant circuit court opinion.

III. Whether the Eleventh Circuit's Opinion rejecting Myers' speculative claim of pretext and sustaining CFI's legitimate nondiscriminatory reason for discharging Myers, which Myers wholly failed to rebut, conflicts with any relevant decision of this Court or with any other relevant circuit court opinion.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondents, David Siegel, Central Florida Investments, Inc., CFI Sales & Marketing, Ltd., Westgate Resorts, Inc. and Westgate Resorts, Ltd., identify Central Florida Investments, Inc.'s parent corporations as the David A. Siegel Irrevocable Trust (99%) and the David A. Siegel Revocable Trust (1%); and identify Westgate Resorts, Ltd.'s parent corporations as Central Florida Investments, Inc. (99%) and the David A. Siegel Irrevocable Trust (.5%). Respondents further state that there is no publicly held company owning 10% or more of the stock of any of the foregoing entities.

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STATEMENT OF CASE AND FACTS

Central Florida Investments, Inc., and its various subsidiary companies (collectively "CFI") develop, manage and sell timeshare resorts in, *inter alia*, Orlando, Florida. During Dawn Georgette Myers' ("Myers") employment with CFI, she held several positions, culminating with the executive director of a new Spa at Westgate Lakes, one of CFI's resorts. (App. B at 5a).[1] While Myers was working at Westgate Vacation Villas doing inhouse sales, she shared with CFI's president and CEO, David Siegel ("Siegel"), her ideas about creating a Spa at one of Westgate's resorts. (App. D at 20a). Eventually, Siegel supported this idea. *Id.* Myers had never worked in a Spa and had no background or experience with Spa design or management. *Id.* at 20a, 21a.

In January, 1998 Siegel named Myers Executive Spa Director of the yet-to-be-built Spa. The promotion came with an increase in pay. *Id.* at 21a. By that time, her pay structure as a timeshare salesperson had been changed from commission-based to a salary of $1,000 per week. *Id.* After she stopped selling timeshare and began working solely for the Spa, her weekly salary increased over time from $1,000 to $1,200, to $1,500 and finally to $2,000 per week. *Id.* Her salary doubled between 1998 and 2000. *Id.*

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[1] In lieu of reproducing the opinions below provided in Petitioner's Appendix, Respondents have adopted the Petitioner's Appendix. Unless otherwise noted, all citations are to that Appendix.

> Myers well knew that Siegel was "all about dollars," so Myers knew that the Spa she envisioned must make money for Westgate. So[,] she emphasized the financial rewards, both directly and indirectly, of having a Spa at one of CFI's resorts. The idea floated around for about a year. Siegel then told Myers that a Spa would be built at Westgate Lakes Resort. . . . Since Myers had no background or experience designing or managing a Spa, for the next year, she researched Spa design and management.

Id. at 34a, 35a.

The Papillion Spa opened in November, 1999. *Id.* at 21a. "Well before the Spa opened, Myers knew that Siegel expected, even demanded, that the Spa be profitable." *Id.* at 37a. However, the Spa was not profitable and Siegel and CFI's Chief Operating Officer, Mark Waltrip ("Waltrip"), frequently discussed with Myers her failure to meet profitability goals. *Id.* Through November, 2000, the Spa was showing an overall loss. *Id.* at 38a.

Sometime before then, Waltrip called Myers to his office for a meeting. *Id.* at 37a. Waltrip "started right in on [her] about the Spa not being profitable." *Id.* She tried to explain her view of why it was not profitable, but Waltrip criticized her management skills and told her she would be better off just designing Spas for the company rather than managing them. *Id.*

In late November or early December, 2000, the lead massage therapist at the Spa since its inception, Bill Toth ("Toth"), threatened to resign because he was "very unhappy there and was not being treated with great respect." *Id.* at 38a, 39a. Myers was insulting to him; was absent from the Spa a lot; and had a "very demeaning" attitude, treating him like he had no understanding at all of the Spa industry. *Id.* at 39a. Toth also talked to Waltrip. Waltrip "was very proactive on the situation." *Id.* at 40a. After Toth's attempted resignation, an investigation was conducted and other Spa employees were asked to provide statements. *Id.* After Waltrip spoke with Toth and learned of the Spa's low morale, he called Siegel and told him there was an issue about the Spa. *Id.* Siegel assumed that Waltrip was referring to profitability, but, instead, Waltrip told him of Toth's charges and recommended Myers' immediate suspension and an investigation. *Id.* Siegel agreed. Myers was suspended and a team from human resources and security conducted an investigation, including interview of the Spa employees. *Id.* According to Waltrip, "a substantial number" of the Spa employees agreed with Toth. *Id.* There was corroboration of instances of Myers being hung over, sleeping in a treatment room, drinking on the job, and using employees for personal tasks. *Id.*

Prior to her discharge Myers was interviewed and she admitted some of the complaints made about her by her subordinates. She was discharged on December 13, 2000. *Id.* at 40a, 41a. According to Waltrip, it was, ultimately, Siegel's decision to terminate Myers,

but the executive management team proposed and supported the decision that she should be discharged. *Id.* at 41a.

Moreover, in compliance with Rule 15, Respondents challenge the accuracy of the following statements characterized as facts in the Petition. Myers claims that Siegel told her his sexual fantasies. (Pet. pg. 3). There is no support for that in the record. Myers also claims that Siegel pressured her to have a ménage-a-trois with him and his wife. *Id.* This is not supported by the record. There was also no evidence that Siegel told Myers to give CFI employees free Spa gym memberships, in spite of Myers' claim to the contrary. (Pet. pp. 4, 17).

Finally, on a matter critical to Myers' assertion that Westgate's reason for her termination was pretextual, she claims that CFI set the staff salaries too high over her objections. (Pet. pg. 5). This is flat wrong and Myers' own testimony contradicts her:

> Well, what happened was that I put together my thoughts on what I thought it should be, and then met with Crystal Malcom in HR. And we sat down and she gave me her opinion as to how she thought it should be set up. And that is where a little bit of problem occurred, because just from my research in the industry, I felt that the therapists should be hired as independent contractors, and she felt that they should be hired – and receive commissions. And then she felt that they should have been hired as employees, receive commissions, and in addition, receive an

> hourly, plus benefits from Westgate. **And because I did not have experience in this prior to this, I completely trusted her judgment. And she said, Georgette, what do you feel the compensation should be for their commission, and I said 40 percent. And she said ok. And maybe because she didn't have any prior experience either in what that might equate to, we agreed on the 40 percent, plus hourly, plus benefits.** (emphasis added).

(Respondents' Appendix 1 at 2a, 3a).

PROCEDURAL HISTORY

Myers sued CFI claiming that she was sexually harassed by Siegel and ultimately fired for rejecting his advances. (App. B at 5a). The United States District Court of the Middle District (the "District Court") dismissed three of Myers' claims and then granted summary judgment to CFI on her remaining claims of sexual harassment and retaliation, which asserted a violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e et seq., and the Florida Civil Rights Act of 1992 (FCRA), Fla.Stat. §§ 509.092, 760.01-11. The District Court also remanded her state law claims of battery and false imprisonment to state court. (App. B at 5a, 6a).

Myers appealed the District Court's grant of summary judgment to the United States Court of

Appeals for the Eleventh Circuit (the "Eleventh Circuit"). *Id.* After reviewing the evidence in the light most favorable to Myers, the Eleventh Circuit agreed with the District Court's determination that Myers failed to sufficiently link her termination to supposed harassment by Siegel. *Id.* at 7a.

The panel noted that:

> under [Myers'] version of the facts, she kept Siegel at bay for a full five years, receiving multiple promotions and pay raises during that time. Although she claimed that Siegel's attitude toward her changed when she became engaged to another man, she offered no evidence that Siegel was even aware of the engagement. Furthermore, Myers certainly knew that the CFI executives were unhappy with the Spa's performance and were holding her responsible. Myers failed to offer evidence rebutting CFI's evidence that she was discharged because of the Spa's lack of profitability.

Id. at 7a, 8a (internal citations omitted).

Because Myers could not establish a connection between her termination and her rejection of Siegel, the panel ruled that her sexual harassment claim could not survive summary judgment on the tangible employment action theory. *Id.* at 8a. Nevertheless, the panel found that Myers did present sufficient evidence to create a disputed issue of fact as to whether she experienced a hostile work environment at CFI. *Id.* In light of that determination, Myers'

state-law battery and false imprisonment claims were reinstated. *Id.* at 6a n.2.

As to Myers' retaliation claim, the panel ruled that the District Court properly concluded that Myers failed to offer evidence supporting a causal connection between any protected activity and her termination. *Id.* at 13a. As to Myers' post-termination retaliation claim the panel found that her claims failed because she could not show that Siegel's decision to file unrelated lawsuits against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination." *See also Burlington N. & Santa Fe Co. v. White,* 126 S.Ct. 2405, 2409 (2006). *See id.* at 13a n.3.

The District Court had ruled that Myers failed to present evidence supporting a causal connection between any protected activity and her termination. (App. D at 70a). Notably, Myers' complaints about Siegel to CFI's management were made only after those same managers had complained about Myers poor performance and investigated her misconduct. *Id.* at 71a. The panel likewise noted that Myers' "formal" complaints to management did not occur until after meetings took place regarding the Spa's lack of profitability. (App. B at 13a).

Moreover, the District Court ruled that Myers had not presented "such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in

the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." (App. D at 77a, 78a) (citing *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir. 2004) (citing *Combs v. Plantation Patterns,* 106 F.3d 1519, 1538 (11th Cir. 1997)). The panel concurred with the District Court which had noted that even if Myers did establish a prima facie retaliation case, CFI had met its burden of offering a legitimate, nondiscriminatory reason for her termination under the applicable *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework. (App. B at 13a). The panel said there was "no question" that the Spa's profitability was a primary concern of CFI management and that they questioned Myers' ability to run the operation. *Id.* at 14a. Thus, even if the District Court had erred in relying on the proffered reasons for Myers' termination (allegations of employee misconduct and complaints filed against Myers), the panel ruled that any such error was harmless because the Spa's loss of money was a sufficient nondiscriminatory reason for her termination. *Id.* (The foregoing rulings in this case by the panel are collectively referred to as the "Opinion").

REASONS FOR DENYING WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED, AS HAD THE DISTRICT COURT, THAT MYERS COULD NOT SHOW THAT SIEGEL'S DECISION TO FILE UNRELATED LAWSUITS AGAINST HER AFTER SHE WAS DISCHARGED WAS RETALIATORY. THAT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT IN *BURLINGTON NORTHERN & SANTA FE RY. CO. V. WHITE* OR WITH ANY SUBSEQUENT RELEVANT CIRCUIT COURT OPINION.

Rule 10 of the Rules of the Supreme Court states:

> Review on a writ of certiorari is not a matter of right, but judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has

> decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *See Braxton v. U.S.*, 500 U.S. 344 (1991). "Special and important reasons" within this rule relating to granting of certiorari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).

Here, Myers argues that it is "a matter of importance that this Court resolve an apparent split among the circuits with one side of that split departing materially from" *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). (Pet. pg. 12).[2] However, contrary to Myers' assertion, this case

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[2] The text of this argument is, in reality, little more than a cut-and-paste job, extracted near *verbatim* from the source of which Myers notes in her Petition. (Pet. pg. 12). However, the underlying premise of the unpublished work upon which Myers entirely relies is incorrect.

presents neither a matter of importance nor any split. *See Rice,* 349 U.S. at 74; *see also* Petition for Writ of Certiorari in *Zelnik v. Fashion Institute of Technology,* Case No. 06-1199 (where petitioner sought to invoke this Court's review of the same issue raised in the instant petition) and this Court's denial of the Petition in *Zelnik v. Fashion Institute Technology,* 127 S.Ct. 2062 (2007). Instead, this case, at best, is nothing more than complaints of incorrect factual findings and the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10.

Quite contrary to Myers' argument, *Burlington Northern* neither held nor even stated in dicta that whether a retaliatory action rises to the level of material adversity can only be resolved by the trier of fact. (Pet. pg. 9). Myers ostensibly extrapolated this holding from the fact that this Court was reviewing a jury's verdict and held that "applying this standard to the facts of this case, we believe that there was a sufficient evidentiary basis to support the jury's verdict on Burlington Northern's retaliation claim." 126 S.Ct. at 2416. In fact, this Court stated that, "[w]e refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable." *Id.* at 2415 (emphasis in the original). This Court stated:

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial

> conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Id. at 2416. This Court's emphasis on objectiveness, on a "judicially administrable" standard, and its references in this regard to the objective standards for constructive discharge and hostile work environment – issues routinely decided on summary judgment – suggest exactly the contrary of Myers' argument. *Id.* at 2415. Clearly, this Court implemented the objective standard so that the district courts may themselves act as gatekeepers in weeding out those trivial lawsuits by determining whether an action is sufficiently materially adverse for retaliation.

Myers' attempt to engraft a per se jury question into *Burlington Northern* is not the worst of the argument's problems. (Pet. pg. 8). Myers' intellectually flawed interpretation of this Court's decision would eliminate the burden shifting analysis of *McDonnell Douglas*, 411 U.S. at 802-03. If a plaintiff were to allege a *prima facie* case, under Myers' theory, prong two would per se become a jury question which would eliminate the employer's current right to assert a legitimate nondiscriminatory reason for the adverse employment action.

To be sure, summary judgment is inappropriate when a genuine dispute exists as to some material

fact. However, the cases cited in the Petition applied this Court's standards in *Burlington Northern* to case-specific facts, in order to determine whether a genuine issue of material fact was created. The Eleventh Circuit expressly and appropriately applied this Court's standards in *Burlington Northern* to the unique facts below and concluded that Myers could not *show* that Siegel's unrelated post-employment lawsuit against Myers constituted an adverse employment action. (App. B at 13a n.3).

Furthermore, none of Myers' cited cases make the possible retaliatory character of an employer's post-employment lawsuit automatically a per se jury question. Thus, the split among the Circuits over *Burlington Northern* which Myers portrays is an illusory one. None of those cases are at odds with *Burlington Northern,* or with the Opinion here. *See Carmona-Rivera v. Puerto Rico,* 464 F.3d 14 (1st Cir. 2006) (no evidence that delays in providing accommodations needed to meet a disability caused harm to plaintiff); *Browne v. Queen's College City University of New York,* 202 Fed. Appx. 523 (2d Cir. 2006) (no evidence that internal review of plaintiff's discrimination claim actually ceased upon transfer from Affirmative Action Committee to General Counsel's Office and transfer alone did not constitute adverse employment action); *Hanani v. State of New Jersey Dept. of Environmental Protection,* 205 Fed. Appx. 71 (3d Cir. 2006) (employer's alleged conduct of increasing employee's work volume, grammatical edits to her work, an alleged reduction in work performance

scores and an argument with a co-worker was not sufficiently severe or pervasive to support claim); *Csicsmann v. Sallada,* 2006 WL 3611729 (4th Cir. Dec. 12, 2006) (elimination of employee's position and transfer to new position were not adverse employment actions); *DeHart v. Baker Hughes Oilfield Operations,* 214 Fed. Appx. 437 (5th Cir. 2007) (written warning to employee for insubordination, being argumentative, and excessive absenteeism were not adverse employment actions because there were colorable grounds for the warning and the warning did not in fact dissuade employee's later charge of discrimination);[3] *Mickelson v. New York Life Insurance Co.,* 460 F.3d 1304 (10th Cir. 2006) (issue of fact existed regarding whether employer's denial of employee's request was based in part on employee's protected filing of salary discrimination claim).

Myers' citation to Circuit Court cases which she acknowledges follow the holding in *Burlington Northern* do not, as she suggests, demonstrate a circuit level conflict. (Pet. pp. 11, 12). Rather, those cases are largely inapposite here, as they reach case-specific results which do not conflict with the Opinion. *See Kessler v. Westchester County Dept. of Social Services,* 461 F.3d 199 (2d Cir. 2006) (genuine triable issue existed as to whether transfer of management-level employee could have dissuaded reasonable employee

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[3] Here, as in *DeHart,* it does not temporally follow that the post-employment lawsuits would have dissuaded Myers from any protected activity during her employment.

from complaining of unlawful discrimination); *Wrobel v. County of Erie,* 211 Fed. Appx. 71 (2d Cir. 2007) (Summary Order) (county employee challenged transfer decision, alleging constitutionally-protected associational conduct, as required to state First Amendment claim, and claiming he was retaliated against for his lack of political affiliation with, or his refusal to pledge his allegiance to, new county administration); *Moore v. City of Philadelphia,* 461 F.3d 331 (3d Cir. 2006) (issue whether supervisors retaliated against white police officers for their opposition to discriminatory comments made by supervisor regarding African-American officers, precluded summary judgment); *Ridley v. Costco Wholesale Corp.*, 217 Fed. Appx. 130 (3d Cir. 2007) (inference that manager knew about plaintiff's discrimination complaint but denied knowledge of same; that manager "reluctantly" subjected plaintiff to repeated discipline for minor incidents shortly after his transfer to a new location; and employer's failure to investigate plaintiff's allegations of post-demotion retaliation was sufficient evidence for jury to determine retaliation issue); *Velikonja v. Gonzales,* 466 F.3d 122 (D.C. Cir. 2006) (plaintiff's claim that she was subject to lengthy investigation, was prevented from receiving promotions during the investigation and that FBI placed a cloud over plaintiff's career supported her retaliation claim); *Czekalski v. Peters,* 475 F.3d 360 (D.C. Cir. 2007) (employee's allegations that her reassignment was effectively a demotion posed jury question).

These cases do not, as Myers' seemingly contends, negate the district court's role to consider such issues on summary judgment. Rather, they suggest only that, *on the specific facts of each case,* summary judgment was not warranted. This is entirely consistent with both the Eleventh Circuit and the District Court's conclusion that Myers simply presented no evidence from which CFI's post-termination actions could be deemed retaliatory, thus warranting summary judgment.

Respondent has located additional cases which specifically cited to the standard in *Burlington Northern* for determining whether a plaintiff has presented a material issue of fact on the question of adverse employment action. None of these cases conflict with *Burlington Northern* or the Opinion here.[4]

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[4] *See Jordan v. Chertoff,* 224 Fed. Appx. 499 (7th Cir. 2006) (employer's failure to permanently reassign employee to position; to extend employee's temporary detail on work team; to grant employee's request for overtime pay; and employee's return to her regular position could not have been materially adverse to reasonable employee); *Chang v. Safe Horizons,* 2007 WL 3254414 (2d Cir. November 5, 2007) (Summary Order) (oral and written warnings issued by employer, questioning by employer, and employer's attempt to access employee's computer do not constitute materially adverse action in the view of the reasonable employee); *Chamberlin v. Principi,* 2007 WL 2692339 (2d Cir. September 12, 2007) (Summary Order) (preventing employee from volunteering as replacement group leader was not an adverse employment action); *Mutts v. Southern Connecticut State University,* 2007 WL 2688871 (D.Conn. September 12, 2007) (being disciplined for two "incidents" and not being promoted were not adverse employment actions); *Hare v. Potter,*

(Continued on following page)

The Eleventh Circuit simply concluded that the evidence Myers adduced could not show that Siegel's decision to file an unrelated lawsuit against her was an action that "would have been materially adverse to a reasonable employee or job applicant," such that "that the employer's actions [were] harmful to the point that they could well [have] dissuade[d] a reasonable worker from making or supporting a charge of discrimination." (App. B at 13a n.3) (citing to *Burlington Northern).* The Opinion does not hold that a post-employment lawsuit can never be retaliation. But Siegel's post-employment lawsuits could not have dissuaded Myers from any protected activity during her employment. *See DeHart,* 214 Fed. Appx. at 437. In fact, the first suit preceded Myers' 2001 sexual harassment charge to the EEOC, which she filed notwithstanding that she had already been sued. So the first suit, which was not an adverse employment action as her employment had long since been terminated, was not, in fact, a potentially materially adverse retaliatory action, coming, as it did, before Myers' relevant protected activity. *Id.* Similarly, Siegel's second suit, which was filed in 2004, could

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2007 WL 4275508 (3d Cir. November 30, 2007) (while employer's refusal to allow employee into a career management program could have been a materially adverse action because the program could contribute significantly to employee's advancement and employee's receipt of a low performance rating as compared to previous years could have been the result of discriminatory animus, employee's claim failed because employee failed to present evidence of causation.)

not have dissuaded Myers from the filing of her EEOC Complaint two and one half years before.

Finally, because of her focus on her *prima facie* retaliation case, Myers' first argument also ignored the panel's conclusion that she failed to provide admissible evidence rebutting the Spa's lack of profitability, which was, without dispute, a stated reason for her termination. (App. B at 13a). Thus, unless this Court also agrees that Myers' third point in her Petition, regarding pretext, is an appropriate subject for this Court's certiorari review, this Court would simply be rendering an academic opinion on this point. *See Rice,* 349 U.S. at 74. As has thus far been shown, Myers' argument is, at its heart, simply that she disagrees with the District Court's factual findings and its application of settled rules of law to them, which was, in the main, embraced by the Eleventh Circuit. This does not make a basis for this Court's certiorari review.

II. THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS REGARDING CORPORATE ALTER EGOS IN *FARAGHER v. CITY OF BOCA RATON* OR *BURLINGTON INDUS., INC. v. ELLERTH* OR WITH ANY OTHER RELEVANT CIRCUIT COURT OPINION.

The essence of Myers' next claim is that the panel committed two errors: it disregarded her complaints to other executives of CFI because those complaints post-dated CFI's clear articulation of its profitability

concerns, and it ignored her supposed historical "complaints" to Siegel himself. (Pet. pp. 12, 13). She argues that the former was tantamount to a per se rule that makes a reprimanded employee automatically ineligible for retaliation protection for complaints that follow a presumably legitimate adverse employment action. (Pet. pg. 13). And, as to the latter, she does little other than demean the Eleventh Circuit. However, from Respondents' vantage point, Myers' argument is that every retaliation claim presents a jury question and the objective scrutiny contemplated by this Court in *Burlington Northern* has no place in a Fed. R. Civ. P. 56 analysis.

This Court has held that an inference of a causal connection based on temporal proximity is negated where there are performance issues that predate protected activity. (App. D at 71a) (citing *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 272 (2001)). The facts are and remain undisputed that Myers complained[5] to Waltrip, Bosch, and Sandra Jones ("Jones") only *after* they first confronted Myers with deficiencies in her own performance or addressed a complaint against her. Myers' comments to Waltrip and to Bosch were made *after* a meeting regarding Spa profitability, during which they were

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[5] CFI disagrees that Myers' comments to her peers constituted complaints cognizable under Title VII. But for purposes of the arguments made at each level of these proceedings, CFI agrees that inferences arising from Myers' words need be drawn in her favor.

critical of Myers' stewardship of the Spa. *Id.* The complaint to Jones occurred only *after* she discussed with Myers the complaint made against her by one of Myers' subordinates. *Id.* Myers is obviously dissatisfied with the panel's (and the District Court's) decision and by its application of the law to the facts presented by the record before it. But, there is no conflict here, and nothing to justify this Court's certiorari review.

Next Myers argues that the panel ignored her comments to Siegel over, presumably, the entire five (5) year period during which Myers claims to have been harassed. Such comments were, according to Myers, made before, during and after CFI made its concerns regarding the Spa's profitability unmistakenly clear, only after which did CFI, *for the first time*, take any adverse employment action against Myers when it terminated her. (Pet. pg. 13). Specifically, Myers argues that the panel "rejected" what she perceives as the holding in *Faragher v. City of Boca Raton,* 524 U.S. 775, 789 (1998), and *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742, 758 (1998) that high-ranking company officials are automatically corporate alter egos imposing, essentially, strict liability in sexual harassment cases.

As a preliminary matter, the *Faragher* and *Ellerth* defense is applicable only in claims for tangible employment action sexual harassment under Title VII. *See Burlington Northern,* 126 S.Ct. 2405, 2413 (*Faragher* speaks of a Title VII requirement that violations involve "tangible employment action" . . .

"and *Ellerth* did not mention Title VII's anti-retaliation provision at all"). Thus, *Faragher* and *Ellerth* have no application here as Myers is contesting only the panel's application of the law to her retaliation claim.

Moreover, the Opinion does not "reject" *Faragher* or *Ellerth* as Myers contends. This is apparent, not only from a plain reading of the Opinion itself, but also from Myers' own words in the Petition: "one *assumes* the Court of Appeals relies on the doctrine that a complaint to the offender himself is not notice to the employing entity." (Pet. pg. 13). It is self evident that if Myers must resort to engrafting her own "assumption" into the Opinion in order to create a "phantom conflict," that there is no conflict at all. It is respectfully suggested that Myers' attempt to shamelessly invent a conflict out of thin air cannot afford a basis for this Court's certiorari review.

More importantly, *Faragher* or *Ellerth*, which did not involve retaliation claims, never created a rule, let alone a per se rule, that the position of the alleged harasser would determine whether a case must go to the jury. Myers essentially argues that because her alleged harasser was the CEO of the company her claims are not subject to summary judgment scrutiny and, most importantly, she is not obliged, like other plaintiffs, to prove each element of *all* her claims. Indeed, what Myers suggests here is contrary to this Courts' holding in *Faragher* or *Ellerth* and to the subsequent application of these holdings by trial and appellate courts.

For example, the Eleventh Circuit recently rejected a similar argument. *Dearth v. Collins*, 441 F.3d 931, 935-36 (11th Cir. 2006), involved a sexually hostile work environment claim under Title VII where the plaintiff, like Myers, rejected the alleged sexual advances of the company's president. The plaintiff argued that strict liability could be imposed on the company, on the basis of the alter ego doctrine, because the alleged harasser was the company's president and sole shareholder. *Id.* at 933. The plaintiff further implicitly argued that the company was precluded from utilizing the *Faragher-Ellerth* defenses because of the position of the alleged offender in the company. The Eleventh Circuit dismissed plaintiff's argument that the *Faragher-Ellerth* defense was inapplicable as "lack[ing] merit." *Id.* at 936. The plaintiff, like Myers here, could not rebut the evidence presented by the employer that she was discharged for job performance.

It is evident that there is no conflict among the Eleventh Circuit's relevant interpretations of the holdings of *Faragher* or *Ellerth* warranting consideration of the issue in this case. The fact that Siegel is the CEO of CFI is, according to *Faragher-Ellerth,* of no moment. Whether an affirmative defense is available and/or whether strict liability is imposed depends on the presence of a tangible employment action claim. That is not the issue here, as a *Faragher-Ellerth* affirmative defense did not figure in CFI's defense of the tangible employment action

claim that Myers did pursue; the summary judgment in favor of CFI on that claim is not before this Court.

More to the point, Siegel's position within CFI does not affect or diminish Myers' burden of proof regarding her retaliation claim. She was required to show that she engaged in a protected activity and that there was a causal relationship between that activity and her termination. She simply did not meet the burden.

Finally, the panel affirmed the District Court's holding that Myers failed to offer evidence rebutting CFI's evidence that she was terminated because of the Spa's lack of profitability. (App. B at 13a, 14a). This holding applied to both Myers' retaliation and tangible employment action sexual harassment claims. *Id.* The District Court also noted that regardless of the different analysis between retaliation claims and the sexual harassment claims, "there is some overlap in the consideration of the claims and in the issues of causation and pretext." (App. D at 65a n.24). The District Court concluded that Myers failed to present evidence supporting a causal connection between any harassment and her termination. *Id.* at 61a. Noting that it "need not *weigh* evidence in order to find a *lack* of evidence of a causal connection," the District Court ruled that temporal proximity between harassment and a tangible employment action does not always give rise to a genuine issue of fact as to causation. *Id.*

Myers acknowledged throughout her deposition that she never suffered any adverse consequences at work after her express rejections of Siegel. *Id.* Despite rejecting Siegel in 1995, 1996 and thereafter Myers advanced at the company rather than suffered. *Id.* From March or April 2000 until November 2000, Siegel allowed Myers to stay at a condominium he owned while her own condominium was being renovated. *Id.* Myers did not describe any change in Siegel's behavior over this time; she merely speculated that, notwithstanding his perceived generosity and absence of outward indicia, he was upset and jealous because she became engaged to Cleve Loveland ("Loveland") in late 2000.[6] *Id.* Such speculation, layered as it was upon a complete absence of admissible evidence, was insufficient to establish a causal connection between her periodic rejections of Siegel and her termination, especially considering the overwhelming admissible evidence of longstanding concerns about Myers' management of the Spa, of which Myers was aware even before she met Loveland. *Id.*

Myers was discharged following an investigation that was initiated by Toth's complaint. Myers herself acknowledged that CFI's executive management was dissatisfied with Myers' management of the Spa and had been so for quite some time. *Id.* Myers admitted

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[6] Nor is sheer speculation sufficient to reduce an otherwise indisputably legitimate reason for Myers' termination to pretext, as will be discussed in Part III *infra*.

to at least some of the complaints made against her during the investigation that preceded her termination. *Id.* Thus, the District Court concluded, even accepting as true Myers' evidence of harassment in the fall of 2000, there was "no reasonable inference of a causal connection between her rejections of that harassment and her termination." *Id.* at 62a, 63a.

The Eleventh Circuit reviewed the evidence in the light most favorable to Myers and agreed with the District Court's determination that Myers failed to sufficiently link her termination to her relationship with Siegel. (App. B at 7a). Under her version of the facts, she kept Siegel "at bay" for a full five years, receiving multiple promotions and pay raises during that time. *Id.* at 7a, 8a. Although she claimed that Siegel's attitude toward her changed when she became engaged to Loveland, she offered no evidence that Siegel even knew of the engagement. *Id.* at 8a. Myers also "certainly knew that the CFI executives were unhappy with the Spa's performance and were holding her responsible." *Id.* Like Myers' first point, this point, standing alone, inappropriately seeks an academic opinion by this Court, and, in any event, does not invoke any "conflict," but only, again, portrays the District Court's factual findings as erroneous and both lower courts' application of correctly stated principles of law to those facts as wrong.

III. THE ELEVENTH CIRCUIT'S OPINION REJECTING MYERS' SPECULATIVE CLAIM OF PRETEXT AND SUSTAINING CFI'S LEGITIMATE NONDISCRIMINATORY REASON FOR DISCHARGING MYERS, WHICH MYERS WHOLLY FAILED TO REBUT, DID NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR WITH ANY OTHER RELEVANT CIRCUIT COURT OPINION.

In Myers' first argument she at least paid lip service to a basis for this Court's certiorari jurisdiction, to wit: a conflict. In her second argument she invented a "phantom" conflict. In her third argument Myers utterly fails to even argue any conflict with the panel's ruling on pretext.

First, Myers claims that the panel erred by "irrebuttably" presuming the Spa's lack of profitability motivated Siegel to fire Myers. (Pet. pg. 15). At the outset, a review of the Opinion reveals no such "irrebuttable" presumption by the panel, but rather its observation that Myers failed to adduce any evidence to the contrary. Reduced to its essence, Myers' argument simply seeks to turn the Eleventh Circuit, from whom she did not receive satisfaction, into nothing more than an intermediate stop and morph this Court into an ultra-super-personnel department to, for a third time, examine CFI's business decisions.

As the District Court opined: "the inquiry into pretext centers upon the employer's beliefs and not the employee's own perceptions of [her] performance."

(App. D at 77a) (citing *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997)). "Title VII is not designed to make federal courts sit as a super-personnel department that re-examines an entity's business decisions." (citing *Davis v. Town of Lake Park, Fla.,* 245 F.3d 1232, 1244 (11th Cir. 2001)). Myers simply cannot establish pretext by "'questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer'" *Id.* (citing *Tidwell v. Carter Prods.,* 135 F.3d 1422, 1427 (11th Cir. 1998)).

Moreover, the District Court ruled that even if Myers had stated a *prima facie* case of retaliation, CFI met its burden of articulating a legitimate, nondiscriminatory reason for terminating Myers which she failed to rebut. (App. D at 72a). Thus, the District Court held that CFI was entitled to summary judgment on the retaliatory termination claims because Myers had not presented "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Id.* at 73a, 78a (internal citations omitted). The Eleventh Circuit properly affirmed this ruling. (App. B at 13a, 14a). Myers does not suggest that any of the cases cited by the District Court were misinterpreted; she simply disagrees with the conclusion the District Court reached when it applied them and with the Eleventh Circuit agreement.

The District Court's decision rested on whether the facts, unique to Myers' case, were sufficient as a matter of law to survive the Motion for Summary Judgment on Myers' retaliation claims. The very fact that Myers resorts to her hackneyed claim that the panel "overlooked" her "strong circumstantial" evidence, (Pet. pp. 17, 19, 20) reveals that Myers' argument is based on her perceived erroneous factual findings or the misapplication of a properly stated rule of law, not on any real conflict. Indeed, the evidence amply supported the panel's affirmance of the District Court's ruling in CFI's favor on the retaliation claim.

Myers conceded that how to market and run the Spa had been an issue since even before the Spa opened – more than a year before she was terminated. (App. D at 73a). She was aware of Siegel's concerns and unhappiness with her Spa management well before she was terminated. *Id.* In Myers' own memorandum dated November 15, 1999, written while she was dating Siegel's son, Richard, months before she was linked with Loveland, and more than a year before she was terminated, she told Siegel:

> I give up! Since it is apparent you do not trust my management ability and you have once again put an obstacle in front of me this time unfortunately I do not know how I will overcome. [sic]. To expect a brand new business to make money in the first two weeks of operation is not only unrealistic, but unheard of.

Id.

This memorandum underscored the obvious: Myers disagreed with her boss about how to run the business. She also acknowledged that she and Waltrip never saw eye to eye and that she had a target on her back as far as Waltrip was concerned; he did not like her or anyone else who bypassed him and got into favor with Siegel. *Id.* at 75a. After Waltrip again discussed the Spa's lack of profitability with her in October, 2000 and suggested she focus on design rather than management, Myers went to Siegel seeking reassurance for her job because she didn't trust Waltrip. *Id.*

In the face of the actual evidence – which came from Myers herself, not CFI – the District Court found that Myers' theory that she was terminated because Siegel was jealous of her engagement to Loveland, based, if at all, on Myers' own speculation which she now characterizes as "circumstantial evidence," did "not hold up." *Id.* The Eleventh Circuit, in affirming the District Court agreed that there was no question that the Spa's profitability was a primary concern of CFI and that they questioned her ability to run the Spa. That admissible evidence, standing alone, provided a sufficient nondiscriminatory reason for her termination. (App. B at 13a, 14a).

Myers claims that "common sense tells us that this was the work of a spurned suitor, not a disappointed employer." (Pet. pg. 18). However, common sense itself balks at such a notion in the face of a complete lack of any real evidence, no matter how pruriently Myers' fertile imagination views the events preceding her termination. What Myers misses is

that circumstantial evidence is still evidence; what Myers calls the conjecture, speculation and theory upon which she bases her argument does not rise to that level. That is what the District Court and the Circuit Court aptly concluded.

Next, Myers cites to *Howard v. BP Oil Co., Inc.*, 32 F.3d 520, 526 (11th Cir. 1994) for the proposition that CFI's "shifting explanations" for the firing are evidence enough of pretext to get to a jury. (Pet. pg. 18). However, *Howard* is inapposite here. In *Howard*, a black plaintiff presented evidence that defendant, who admitted to a lack of written criteria, testified inconsistently about the qualifications of those to whom dealerships were awarded. *Id.* Not surprisingly, the Eleventh Circuit viewed defendant's subjective and ad hoc criteria for awarding gas station dealerships with the greater scrutiny appropriate in a § 1981 action alleging racial discrimination than it would have had defendant strictly followed written criteria. *Id.*

Here, the District Court discerned no such inconsistency. Indeed, CFI presented multiple grounds, all of them legitimate, to terminate Myers, even if all of them were not, in fact, used. (App. D at 75a). In the Motion for Summary Judgment, CFI argued "[w]hile her termination was justified for several reasons, the main reason for Myers' termination was her inability to make a profit, or, at least, reduce the Spa's losses." *Id.* at 76a. The District Court did not read this as either inconsistent with or an abandonment of other potentially legitimate reasons, such as the results of the investigation prompted by Toth's complaint. *Id.*

Myers acknowledged Siegel was "all about dollars." *Id.* at 77a. The District Court was not surprised that Siegel would emphasize "the numbers" when asked why Myers was terminated. *Id.* The District Court rightly concluded that Siegel's explanation was consistent with that of the witnesses who were involved in the investigation of the Toth complaint; it was clear that the investigation, in which Myers actually admitted to instances of misconduct, was the last straw as far as Myers' employment was concerned.

The premise of Myers' argument is flawed. She describes, in her Petition, the "circumstantial" evidence she claims gave rise to a jury question without providing references to the record that Myers has provided to this Court. The problem is that she did the same thing before the District Court and before the Eleventh Circuit, and they found her offerings unpersuasive. The absence of support, other than Myers' imagination, in the record before the courts below doomed this argument there. It is not appropriate for Myers to wheel this out a third time, especially as there is no basis in the record actually before this Court for what Myers asserts was ignored by both prior courts. Certainly, Myers has presented no basis for certiorari review.

Turning to the record that was actually before the courts below, as the District Court noted, the record was replete with testimony from Myers, Siegel and Waltrip that the Spa was not profitable and Myers knew so, and that Myers knew, from the

outset, that this was *the* critical demand made by her employer. *Id.* at 37a. All matters affecting Myers' termination were substantiated and all of them were true. Understandably, the importance of each reason varied by witness. That did not render any of the reasons false. The District Court found Myers' termination justified and not retaliatory, entitling CFI to summary judgment. *Id.* at 77a, 78a.

The panel did not disagree with the District Court's conclusion that there was no inconsistency. Instead, the Eleventh Circuit ruled that "[*e*]*ven if* the district court erred in relying on the other proffered reasons for Myers' termination (allegations of employee misconduct and complaints filed against Myers), any such error was harmless because the Spa's loss of money was a sufficient nondiscriminatory reason for her termination." (emphasis added) (App. B at 14a). This ruling comports with *Holifield,* 115 F.3d at 1565; *Davis,* 245 F.3d at 1244; and *Tidwell,* 135 F.3d at 1427. Even Myers does not claim that this ruling conflicts with another decision.

Thus, despite her contention to the contrary, Myers did not present any evidence that any of the cited reasons were false or would otherwise allow a jury to disbelieve Siegel's stated reason for her termination and infer intentional discrimination in the firing. (Pet. pg. 19) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 147 (2000)) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993)). The demonstrated absence of such evidence proved critical to both courts below.

Moreover, in *Reeves,* this Court held that a plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's asserted justification is false, only "may" permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves,* 530 U.S. at 148. However, this Court quickly added

> that is not to say that such a showing by plaintiff will *always* be adequate to sustain a jury's finding of liability . . . For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (emphasis in the original).

In *St. Mary's,* this Court held that the rejection of a defendant's proffered reasons does not compel judgment for the plaintiff, because a contrary ruling would disregard the fundamental principle that a presumption does not shift the burden of proof and would ignore this Court's repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." *St. Mary's,* 509 U.S. at 511.

Here, not only was Myers unable to establish a *prima facie* case, but she failed to put forth any evidence that CFI's reasons were false or that its actions were unjustified. Therefore, according to the

cases upon which Myers relies, the trier of fact could not conclude that CFI unlawfully discriminated against Myers. In any event, Myers' argument is predicated upon nothing more than factual findings she perceives to be erroneous and well-established, noncontroversial rules of law she deems misapplied, neither of which is a basis for certiorari review.

CONCLUSION

For the reasons suggested above the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAWN GEORGETTE MYERS,

Plaintiff,

vs.

CENTRAL FLORIDA INVESTMENTS, INC., CFI SALES & MARKETING, LTD., WESTGATE RESORTS, INC., WESTGATE RESORTS, LTD., and DAVID SIEGEL,

Defendants. /

CASE NO.
6:04-cv-1542-Orl-28DAB

VOLUME I

Videotaped Deposition of:	Dawn Georgette Myers
Taken by:	The Defendants
Date:	November 30, 2005
Time:	9:17 a.m
Location:	Zacco & Associates 605 East Robinson Street Orlando, Florida
Reported by:	Elizabeth M. Love, RPR

* * *

[164] period of time?

A. Yes, sir, I was.

Q. Okay.

A. And then I think the next increase came when I wasn't selling timeshare anymore and I was full-blown into developing the spa. And then the final increase came when I put together the – my spa's – the staff salary requirements, and myself was included in there, and David approved all of the requirements.

Q. Okay. So at that point, you created, I guess, a spreadsheet of the various positions and what the salary structure was going to be, and of course, on that spreadsheet was the spa director, which was you; right?

A. Yes, sir.

Q. And you specified the compensation level that you wanted; right?

A. Well, what had happened was I put together my thoughts on what I thought it should be, and then I met with Crystal Malcolm in HR. And we sat down and she gave me her opinion as to how she thought it should be set up. And that was where a little bit of the problem occurred, because just from my research in the industry, I felt that the therapists should have been hired as independent contractors, and she felt that they should have been hired – and receive commission. And then she felt that [165] they should have been hired as employees, receive commission,

and in addition, receive an hourly, plus benefits from Westgate.

And because I did not have any experience in this prior to this, I completely trusted her judgment. And she said, Georgette, what do you feel the compensation should be for their commission, and I said 40 percent. And she said okay. And maybe because she didn't have any prior experience either in what that might equate to, we agreed on the 40 percent, plus hourly, plus benefits.

And then I spoke with Mr. Siegel individually and – I would say maybe for a year prior to that, David and I had had conversations about what I would be making once the spa was up and running. And –

Q. What were those conversations?

A. Well, of course I told him what I wanted to make.

Q. Which was?

A. I said, you know, I want to at least make 100,000 a year, because I was working really hard and my intention was to put spas at every resort that we did from that point on. And I felt like I deserved it. I was a director and I knew what the other directors were making in the company, and actually 100,000 is a lot less than what the other directors are making in the company. So I

* * *